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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 321

FRANK KORNFEIND, DOING BUSINESS AS CHICAGO-NEBRASKA MOTOR EXPRESS,

Appellant,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

STATEMENT AS TO JURISDICTION

JOSEPH E. KELLER,
THOMAS M. WALL,
Counsel for Appellant.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Opinion below	1
Jurisdiction	2
Question presented	2
Statutes involved	3
Statement	3
The question is substantial	7
Appendix "A"—Findings of fact and conclusions of law	18
Appendix "B"—Sections 312(a) and 312(b) of Title 49 of the United States Code Annotated entitled "Suspension, change, revocation and transfer of certificates, permits and licenses."	23
Appendix "C"—Final judgment and decree	24

Table of Cases Cited

American Trucking Associations v. *United States*, 326 U.S. 77	2
Commercial Standard v. *Robertson*, 159 F. 2d 405	12
Cornell Steamboat Co. v. *United States*, 321 U.S. 634	2
Garfield v. *Smith*, 317 Mass. 674, 59 N. E. 2d 287, 324 U.S. 879	12
General Transportation Co. v. *United States*, 65 F. Sup. 981	16
On Time Transfer Co. v. *Buckingham*, 44 M.C.C. 389	9
Rochester Teleph. Corp. v. *United States*, 307 U.S. 125	2
Schenley Dist. Corp. v. *United States*, 326 U.S. 432	2
Sprague v. *Well*, 122 F. 2d 128, 314 U.S. 669	15
United States v. *Hancock Truck Lines*, 324 U.S. 774	2
United States v. *Detroit and Cleveland Nav. Co.*, 326 U.S. 236	2
Watson v. *Jaffa*, 143 F. 2d 340	12

Page

Statutes and Other Authorities Cited

Administrative Procedure Act:
- Section 2(e) 10
- Section 5(a) 13
- Section 9(b) 9, 11, 17

Interstate Commerce Act:
- Section 204(a)(1) 11
- Section 312(a), as amended 13

Interstate Commerce Commission Regulations:
- Rule 53 13
- Rule 68 13

Interstate Commerce Transfer Regulation 179.4 16
Motor Carrier Act, Section 212(a) 16

United States Code Annotated:

Title 5:
- Section 1004(a) 13

Title 28:
- Section 1253 2
- Section 2101(b) 2
- Section 2284 2

Title 28:
- Sections 2321 through 2325, inclusive 2

Title 49:
- Section 5 13
- Section 304(a)(1) 11
- Section 304(c) 2
- Section 305(e) 13
- Section 312(a) 2, 8, 9, 10, 15, 16
- Section 312(b) 9, 16
- Section 321(b) 12

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Civil Action No. 50 C 383

FRANK KORNFEIND, Doing Business as CHICAGO-NEBRASKA MOTOR EXPRESS,

Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendant

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, Plaintiff-Appellant submits herewith its Statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of a District Court in this cause.

Opinion Below

The opinion of the District Court of the United States for the Northern District of Illinois, Eastern Division, is not reported. A copy of the Findings of Fact and Conclusions of Law and the Final Judgment and Decree, both dated May 26, 1952, are attached hereto as Appendix A.

Jurisdiction

This is an action to enjoin and set aside certain orders issued by the Interstate Commerce Commission brought under Title 28, United States Code, Sections 2284 and 2321-2325, inclusive. The final judgment of the District Court was entered on May 26, 1952. A petition for appeal is presented in the District Court herewith on this 23rd day of July, 1952. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Schenley Dist. Corp. v. *United States*, 326 U. S. 432; *Cornell Steamboat Co.* v. *United States*, 321 U. S. 634; *United States* v. *Hancock Truck Lines*, 324 U. S. 774; *United States* v. *Detroit and Cleveland Nav. Co.*, 326 U. S. 236; *American Trucking Associations* v. *United States*, 326 U. S. 77; *Rochester Teleph. Corp.* v. *United States*, 307 U. S. 125.

Question Presented

Has the Interstate Commerce Commission the power to revoke or rescind an authorization permitting a partnership as lessee to exercise motor carrier operating rights (issued by the Commission to the lessor) without giving the partnership lessee a reasonable period of time to correct its alleged deficiencies, in the light of the requirements of 49 U. S. C. A. Section 312(a) which specifically provides, in pertinent part, that no certificate, permit or license shall be revoked (except upon application of the holder) unless the holder thereof wilfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in Section 304(c) of Title 49 of the United States Code, commanding obedience to the provision of this

chapter, or to the rule or regulation of the Commission thereunder, or to the term, condition or limitation of such certificate, permit or license, found by the Commission to have been violated by such holder?

Stated otherwise, the ultimate question is whether the Commission acted within the authority validly conferred upon it in reordering a transfer to the lessor of the motor operating rights which he (the lessor) has leased to W. C. Ross and Frank Kornfeind, a partnership, thus revoking the partnership's rights. Subordinate questions are:

1. Whether the orders of the Commission were entered arbitrarily and in disregard of applicable law;

2. Whether these orders were supported by the evidence, and

3. Whether there was any other error in the proceedings.

All the points raised in the Assignment of Errors are also presented. The Question Presented, as stated above, sets forth the major issues.

Statutes Involved

Section 312 of the Interstate Commerce Act, as amended, copied in Appendix "B".

Statement

The facts representing the motor carrier operations involved are stated by the Commission in its report which are attached to the Complaint as exhibits. The following facts are drawn from the report:

The motor carrier operating rights involved in this proceeding are described in Certificate No. MC-18859 originally issued by the Interstate Commerce Commission, on June 19, 1944, to Arnold N. Harper. Pursuant to Commission's authority and its order of February 28, 1946, these rights were acquired by one C. N. Smith, d/b/a Chicago-Nebraska

Motor Express. Subsequent thereto, on April 8, 1948, the Commission approved the leasing of such rights from Smith to W. G. Ross for a period of five years expiring April 8, 1953. On December 16, 1948, the Commission granted a petition submitted by Frank Kernfeind (Appellant) and Ross requesting authority to substitute a partnership composed of Appellant and Ross, d/b/a Chicago-Nebraska Motor Express, as the lessee of said operating rights. As a result of the last described order, the partnership succeeded to the rights and obligations of the lessee under the lease.

On April 18, 1949, Smith (herein sometimes described as the lessor) filed a petition with the Commission, stating that the partnership had abandoned operations of the operating rights, that it had permitted insurance required by the Commission to lapse, and that despite demands upon the partnership to cure defaults in its contract and to reinstate operations, such defaults had not been cured. The petition prayed that the Commission enter an order terminating the lease. On May 23, 1949, Appellant filed an answer to lessor's petition. To Smith's petition, his lessees, of which Appellant is one, filed an answer, wherein they denied that they had defaulted in the terms and conditions of the lease and averred that Smith had waived the breach of the lease as to rental payments; that lessees had been arranging for reinstitution of operations and had never abandoned the operation but had ceased operations temporarily, pending arrangements for filing appropriate insurance; that they voluntarily discontinued operations following cancellation of the insurance; that they had arranged for sufficient working capital so as to continue operations.[1] The lessees fur-

[1] When Kornfeind (Appellant) learned of the filing of the Smith petition, he wired the Commission of a desire to continue operation; that an agreement for cancellation of the lease, executed between Smith and Ross was not authorized as a valid act of the partnership. Ross later requested withdrawal of that agreement.

ther averred that they were fit, willing and able to continue operations and, with working capital available, were in a position to provide adequate service, and that the cancellation of the lease would impair lessees' ability to meet their obligations to their creditors and would otherwise be contrary to the public interest. Smith filed a reply on May 31, 1949. The Commission, on August 3, 1949, without hearing, issued an order in which it found that the partnership as lessee and Smith as lessor had agreed in writing that the agreement of lease would, at the option of Smith, cease and terminate if the partnership should fail to comply with the terms and conditions thereof. The Commission further found that the partnership discontinued operation under the lease, had failed to comply with all of the terms of the lease, that Smith had exercised his option as granted in the lease to consider it terminated. It thereupon ordered Smith, as lessor, to resume operations in his own behalf. On October 17, 1949, Kornfeind and Ross filed a petition with the Commission for reconsideration and vacation of the order of August 3, 1949. This was denied by order of January 3, 1950, which contained findings similar to the findings in the August 3, 1949 order. Both of the orders referred to above were made without hearing or oral argument.

On March 20, 1950, Plaintiff (Appellant) filed its complaint herein seeking to set aside and enjoin the above-described orders entered by the Commission on October 17, 1949 and January 10, 1950. After the filing of the suit, the Interstate Commerce Commission, by order dated May 23, 1950, on its own motion, reopened the proceedings for further consideration in formal hearing. In an order dated June 9, 1950, the Commission notified all parties that the matter would be the subject of a formal hearing on July 11, 1950 before Joint Board 136, at Omaha, Nebraska. The order contained a detailed statement of the facts in controversy and a detailed recitation of the history of the contro-

versy but was devoid of any issues or of any statements of any kind as to the matters to be considered at the hearing. At the hearing before the Board on the date assigned, appearances were entered on behalf of the Plaintiff, Smith, and another party whose participation therein is not pertinent here. Smith and the other party introduced evidence but none was offered on behalf of Plaintiff. Kornfeind (Appellant), through his attorney, stated that if the hearing included the August 3, 1949 order (which he did not know) then everything which he had claimed in the instant case in his complaint before the Court, *i. e.*, that the Commission did not have jurisdiction to enter the order involved because the question of the termination or lack of the termination of the lease was a judicial question; that he relied upon the proposition that the Commission had no jurisdiction to consider the question as to whether the lease had been terminated and that the Commission had no jurisdiction to issue any order other than the originally issued order which approved the application.

At the conclusion of the hearing, the Joint Board, on October 27, 1950, issued its recommended report and order finding that there had been a discontinuance of operation by the partnership and that the partnership (composed of Appellant and Ross) was dissolved on December 15, 1948 and that thereafter no operations had been conducted by the partnership, as such.

On March 27, 1951, Division 5 of the Commission issued its report and order summarizing and adopting the findings of fact made by the Joint Board in its recommended report and order, and also commenting on the exceptions filed by the Plaintiff with respect to the report and order of the Joint Board. On November 13, 1951, the Commission denied a petition filed by Plaintiff seeking reconsideration of the 1951 order of Division 5.

As indicated, Plaintiff (Appellant) in the United States District Court for the Northern District of Illinois, Eastern Division, brought this action to enjoin and set aside the orders issued by the Interstate Commerce Commission which caused a cessation of operations by the Plaintiff as the lessee of motor carrier operating rights to engage in the transportation of interstate and foreign commerce. The District Court upon the pleading, the arguments of counsel and brief submitted, filed its Findings of Fact and Conclusions of Law and entered its Final Judgment and Decree on May 26, 1952, dismissing the complaint. The Court held that the Commission had jurisdiction over and the authority to conduct the proceedings wherein the report and order of March 27, 1951 and the order of November 13, 1951 were made; that the Commission's order of June 9, 1950, notifying parties of the formal hearing to be held before Joint Board 136, on July 11, 1950, at Omaha, Nebraska, contained sufficient information to inform the parties of the nature of and reason for such hearing; that the Commission's finding that Appellant had discontinued operation of the motor carrier operating rights which it was authorized to conduct pursuant to the terms of the lease agreement approved by the Commission, between the lessor and owner of such rights and the partnership of which Appellant was a member, and that by the terms of such lease agreement such discontinuance of operations caused an immediate reversion of such rights to the lessor and owner of the rights; that the Commission's findings were supported by substantial evidence and that the Commission's Report and Orders were made and issued within its statutory authority.

The Question Is Substantial

The issues involved in this appeal are of great importance to the public transportation industry and to the administra-

tion of the Interstate Commerce Act. Their importance to the administration of the Act is attested by the fact that after Appellant instituted this action in the District Court, the Commission, on its own motion, instituted new proceedings in which it attempted to correct the deficiencies in its prior procedure in this case and in order, for the first time, to afford Appellant a hearing. The issues involved raise an important question of law which has not been, but should be, settled by the Supreme Court.

The Commission's power to revoke its approval of the lease involved herein is derived from Section 312(a) Title 49 U. S. C., which provides, in pertinent part, that no certificate, permit or license shall be revoked (except upon application of the holder) unless the holder thereof wilfully fails to comply within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission commanding obedience to the provisions of the statute or of the Commission's Rules and Regulations, or to the term, conditions, or limitation of such certificate, permit or license, found by the Commission to have been violated by the holder. Section 312(a) covers, of course, leases of certificates, permits and licenses. Despite the express wording of the statute, the Commission failed to give it effect or to abide by its requirements. On the contrary, the Commission, on August 3, 1949, issued an order in which it found that the partnership had discontinued operations under the lease, had failed to comply with the terms of the lease and that the lessor exercised his option granted in the lease to consider the lease terminated. It thereupon ordered the lessor to resume operations in his own name and, in effect, revoked Appellant's authorization, all without meeting the requirements of Section 312 of the Act and without hearing. It is true and the Commission granted a hearing at a later date, after Appellant had brought the instant action in District Court but at no time

did the Commission follow out the requirements of Section 312(a) of Title 49 of the United States Code. Nevertheless, the District Court, without any discussion of the 312(a) point, held that the Commissions' Order was based upon substantial evidence and that no error of law had been committed. Clearly, Appellant came within the provisions of Section 312(a) of Title 49 of the United States Code and the Commission, at no time even attempted to comply with the terms thereof. The Commission itself has held, in other cases, that as far as revocation or suspension is concerned, leases and certificates of public convenience and necessity are protected by the same procedural safeguards. (*On Time Transfer Co.* v. *Buckingham*, MC-395 44 M. C. C. 389) The word "holder" in the section referred to, must refer to the lessee as one whose property right is to be protected by notice, hearing in time to comply, unless, of course, that "holder" waives his right by himself voluntarily requesting revocation of the approval previously granted by the Commission of the right to operate under the lease.

It would appear self-evident that the Commission's and the Court's failure to comply with the mandate of Congress as expressed in Section 312 of Title 49 of the United States Code alone justifies reversal of the Commission's decision appealed from in the instant case. However, the United States has taken the position, in its brief filed with the District Court, that the Commission was justified in the course of action which it followed in the light of the provisions of Section 312(b) of Title 49 of the United States Code. The short answer to that argument is that 312(b) governs transfers only, not revocations.[2] In addition, Section 9(b) of the Administrative Procedure Act specifically provides, in pertinent part, that except in cases of wilfull-

[2] Section 312(b) provides that except as provided in Section 5 (not pertinent here) any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe.

ness or those in which public health, interest or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements.[3] Contrary to the reqirements in cases of revocation under Section 312(a) of the Act, the Commission failed to afford Appellant an opportunity to comply and to correct any deficiency it may have found in its conduct toward the public.

Other considerations, equally valid, require reversal. The Commission revoked Appellant's authorization, in its Order of August 3, 1949, on the theory that the lease had terminated because defaults in the lease had occurred and the lessor had exercised its option to consider the lease terminated. In his petition for reconsideration of this Order, Appellant argued to the Commission that the determination of whether a party to the lease had or had not performed his duties under the lease was a question capable of judicial determination only and beyond the Commission's jurisdiction. However, the Commission issued its order of January 10, 1950, denying the petition for reconsideration, and again took the view that the rights in question had automatically reverted to the lessor because the lessor had exercised his option under the lease—not because lessee had done something harmful to the public interest or because the Commission had acted on the rights granted by the Interstate Commerce Commission. After the Commission's order of January 3, 1950 was issued, Appellant filed

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[3] Section 2(e) of the Administrative Procedure Act states that a license includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption *or other form of permission.*

its complaint in the District Court raising the point that the Commission's Orders complained of were beyond its jurisdiction as being in determination of solely judicial issues. The Commission then reopened the matter for hearing and, in its Report and Order recommended by Joint Board 136 and served October 27, 1950, the Commission, in terms, conceded this saying (second paragraph, Sheet 6):

> "In view of the discontinuance of operations by lessees, and the resulting reversion of the rights by reason thereof, it appears unnecessary to determine whether the default in payment of rental, when disputed by lessees, would be sufficient alone, without judicial determination, to warrant the Commission declaring the lease terminated. *This, of course, is a private matter with which the public interest is not so vitally concerned.*" (Emphasis added.)

Here, for the first time, the Commission took the view that the discontinuance of operation by the Appellant from resuming operations regardless of any defaults under the lease or election of option to terminate by the lessor. However, Appellant was given no opportunity to correct these alleged deficiencies despite the requirements of Section 312 of the Act and of Section 9(b) of the Administrative Procedure Act.

Section 204 (particularly Section 204(a)(1) of the Interstate Commerce Act (Section 304(a)(1), Title 49, U.S.C.) sets forth the Commission's powers and duties; and there is nothing in that section (or in the Act as a whole) concerning the Commission's power to determine the legal effect of the lease as between the lessor and lessee of rights. All the Commission may do is determine whether a carrier meets certain standards for the protection of the public upon the highways of interstate commerce from the hazards of operation by inexperience, incompetence, and unfit persons, by those engaged in excess of maximum hours, or operating

with bad conditions and dangerous equipment.[4] Once a lessee has met the Commission's Standards of service to the public, and the Commission determined this when it first approved the lease as to Appellant, the legal effect of the lease is a question for the Courts only.[5]

Section 321(b), Title 49 U.S.C. provides that "* * * all orders of the Commission shall take effect within such reasonable time, not less than thirty days, as the Commission may prescribe * * *" The orders complained of merely declared that the lease had terminated, that the lessor should comply with the provisions of the Interstate Commerce Act with respect to such matters as insurance and tariffs, and that Appellant should cease any further operations under the lease arrangement in interstate commerce without prescribing "a reasonable time not less than thirty days."

It is patently clear that the orders subsequent to the hearing of July 11, 1950, affirming the orders issued prior to that hearing were invalid, since the notice was devoid of issues and failed completely to indicate the purpose of the hearing. After the Commission had issued its final orders of August 3, 1949, January 10, 1950 and March 15, 1950, Appellant on March 20, 1950, filed his complaint in the District Court herein charging that the Commission had acted beyond its jurisdiction. The United States of America then requested the Appellant to stipulate to extend the time within which it could plead to the complaint since the Commission wanted to reopen the matter. The stipulation was entered into, and on its own motion, on May 23, 1950, by order, the Commission reopened the matter although no copy of the order was ever given the parties. On June 9, 1950, by order served on the parties, the matter was set for

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[4] *Cf. Commercial Standard* v. *Robertson* (C.C.A. Tenn. 1947), 159 F. 2d 405.

[5] See *Watson* v. *Jaffa*, (CCA Neb. 1944), 143 F. 2d 340 and *Garfield* v. *Smith*, 317 Mass. 674, 59 N.E. 2d 287 (1945), Cert. Den. 324 U.S. 879.

hearing for July 11, 1950, at Omaha, Nebraska; this order was served on the parties, and was the only notice of the only hearing in the proceeding.[6] There is authority in the Interstate Commerce Act and the Commission's own rules, as well as in common sense, for the proposition that the parties should be advised in advance of the issues to be explored at a hearing. The Interstate Commerce Act (Section 305(e) Title 49, U.S.C.) provides for reasonable notice of Joint Board hearings to interested parties. Rule 53 of the Commission's Regulations dealing with the shortened procedure, provides that if the Commission issues an Order setting a hearing it "will specify the matter upon which * * * oral evidence is to be introduced." Where the long procedure is used, pre-hearing conferences are called under Rule 68 of the Commission's Regulations to define the issues raised by the pleading. In either case, there is definite knowledge given before the hearing of what the issues will be.

The Administrative Procedure Act, to which the Commission is subject, provides in Section 5(a) (Section 1004 (a), Title 5 U.S.C.) that persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matter of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceedings will be given prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleadings. The House Report accompanying this Act says of this section:

> "A party must be given ample notice of the legal and factual issues with due time to examine, consider and prepare for them."

[6] This "notice-order" of June 9, 1950 gave the time, date and place of the hearing, but was absolutely silent as to the purpose of the hearing.

The Commission itself admitted the lack of specification of purpose, when it stated in the order served October 27, 1950:

> "The Commission's Order of May 23, 1950, reopening the proceedings for hearing, did not specifically describe the purpose thereof, but it seems apparent that the primary purpose was to afford the parties an opportunity to present evidence in support of their respective positions, concerning the status of the lease, and particularly to afford the partnership an opportunity to show that the findings in the order of August 23, 1949 and January 10, 1950, were erroneous."

The phrase "seems apparent" does not meet the requirements of the authorities cited. It is abundantly clear that the Commission's decision to reopen the matter and afford Appellant a hearing after Appellant had filed his action in the District Court was a last-minute attempt to correct the illegality of what had gone before, *i.e.*, the orders which Appellant sought to enjoin. The District Court summarily dismisses the fact that Appellant was never apprised of what the issues would be at the "post litigation" hearing by stating that the Commission's order notifying the parties that the matter would be subject of a formal hearing contained an elaborate statement of the facts in controversy and a detailed recitation of the administrative history of the controversy. The difficulty with that holding is that Appellant was not advised therein what matters would be considered at the hearing but was advised only of facts of which he was well aware and that there would be a hearing. Despite the requirements of the Administrative Procedure Act, Appellant was not told what the purpose of the hearing was and obviously was unable to prepare his case.

Appellant has a large investment in its operation, an investment made, of course, in reliance upon the original approval of the lease. The Commission's action in re-

opening the proceedings after a considerable lapse of time should be surrounded with the most elaborate procedural safeguards—wholly lacking in the instant case.[7] After an investment has been made in reliance upon an order of the Commission, the Commission's power to revoke that order is limited by due process in order to avoid confiscation of that investment. It is conceded that Appellant suspended operations for from sixty to ninety days. However, the Commission nowhere made a finding that the discontinuance of operations was permanent or temporary; indeed, it could not have found it was permanent inasmuch as it found operation was resumed sixty to ninety days later. The Government argues that the public has an interest in continuous service and that the Commission was justified in revoking its approval because of the discontinuance. If there had been a permanent discontinuance, or, if Appellant had wilfully violated the condition of the Commission's approval and the Commission had proceeded properly under Section 312(a), Title 49, U.S.C.A., it could revoke its approval. In the instant case, the Commission's agent had requested Appellant to suspend, temporarily, his operations until the filing of his insurance could be perfected. This suspension the Commission has a right to require under the last sentence of Section 312(a), on reasonable notice and without hearing for failure to comply with the tariff or insurance sections of the Act, but only until compliance with those tariffs or insurance sections.

Appellant did suspend operations, did perfect the filing of its insurance, and did resume operations immediately thereafter. In the instant case, the Commission proceeded, lawfully at first, under the suspension provisions of Section

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[7] See *Sprague* v. *Woll*, 122 F. 2d 128 (C.C.A. Ill. 1941) Cert. Den. 314 U.S. 669.

312(a), without hearing, and later, still without hearing, and now unlawfully, issued its order revoking its approval. When objection was made to the Commission's taking jurisdiction over a private dispute between the parties to the lease over the performance of the lease, and issued its order on the ground that it had found a reversion in the lease, the Commission affirmed its order on the ground of discontinuance of operations. When objection was made to the issuance of revocation order on this ground without having the hearing required under Section 312(a), the Commission then, for the first time, set the matter for hearing to justify its order. This is assuredly not the sequence of events required under Section 312(a) for revocation.

When a ground actually exists for revocation (and it does not in the instant case), the Commission must then follow Section 312(a) and provide a proper notice, a proper hearing, time to remedy any defect found, and then finally an order of revocation, *in that sequence.* (The Government also argues that under Transfer Regulation 179.4 promulgated pursuant to Section 312(b) when Appellant received the original approval of the lease it was on condition that the applicant had agreed in writing that upon a discontinuance of operations operating rights shall revert to the lessor. The reversion, however, to lead to revocation of approval of the lease, must be in accordance with the procedural sequence outlined under 312(a). A certificate is never automatically revoked by discontinuance of operations, but only after the Commission has proceeded properly after proper notice and hearing under 212(a) of the Motor Carrier Act, 49 U. S. C. 312(a).[8]

It is submitted that the decisions of the District Court and the Commission fail to give effect to the express terms

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[8] See *General Transportation Co.* v. *U.S.*, D. C. Mass. 1946, 65 F. Sup. 981.

and intent of the Act and, particularly section 312(a) of the Interstate Commerce Act and Section 9(b) of the Administrative Procedure Act, and must, therefore, be reversed.

Respectfully submitted,

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APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 50 C 383

FRANK KORNFEIND, Doing Business as Chicago-Nebraska Motor Express, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*

Findings of Fact and Conclusions of Law

The above entitled action having come on for final hearing on April 28, 1952 before a duly constituted District Court of three judges established pursuant to Sections 2284 and 2321-2325, Title 28 of the United States Code, and all parties being represented by counsel, and the Court having heard the arguments of counsel, and having taken the cause under advisement, and having considered the pleadings, the evidence contained in the record made before the Interstate Commerce Commission, the arguments and briefs of counsel, and the Court being fully advised in the premises now makes the following findings of fact and conclusions of law:

Findings of Fact

1. This is an action to enjoin and set aside certain orders issued by the Interstate Commerce Commission which cause a cessation of operations by the plaintiff as the lessee of motor carrier operating rights to engage in the transportation of interstate and foreign commerce. The orders here attacked were entered by the Commission in its Docket No. MC-FC 31549 on March 27, 1951 and on November 13, 1951.

2. The above orders were issued by the Commission in conjunction with a report issued by Division 5 of the Commission and in the normal course of its administrative pro-

cedure following the completion of a hearing of the matter before a Joint Board at Omaha, Nebraska on July 11, 1950 at which time and place the plaintiff and other parties appeared and were afforded the opportunity to introduce any and all evidence bearing on the controversy.

3. The motor carrier operating rights involved in this proceeding are described in certificate No. MC 18859 originally issued by the Commission on June 19, 1944 to one Arno M. Harper. Pursuant to Commission authority and its order dated February 28, 1946, these rights were acquired by one C. H. Smith, d/b/a Chicago-Nebraska Motor Express. Subsequent thereto and on April 8, 1948, the Commission approved the leasing of such rights from Smith to one W. G. Ross for a period of five years expiring April 8, 1953. On December 16, 1948 the Commission granted a petition submitted by the plaintiff and Ross requesting authority to substitute a partnership composed of the plaintiff and Ross, d/b/a Chicago-Nebraska Motor Express, as the lessee of said operating rights.

4. On April 18, 1949 Smith, (herein sometimes described as the lessor), filed a petition with the Commission stating that the lessee (the partnership) had discontinued operation of such rights, that it had permitted insurance required by the Commission to lapse and that despite demands made upon the partnership to cure defaults in its contract of lease and to reinstitute operations, such defaults had not been cured and operations had not been resumed. The petition prayed that the Commission enter an order terminating the lease. On May 23, 1949 the plaintiff filed an answer to the lessor's petition. Upon consideration of the petition and plaintiff's answer, Division 5 of the Commission on August 3, 1949 issued an order in which it found that the partnership as lessee and Smith as lessor had agreed in writing that the agreement of lease would at the option of Smith, cease and terminate if the partnership should fail to comply with the terms and conditions thereof. The Commission further found that the partnership had discontinued operations under the lease, had failed to comply with all the terms of the lease and that Smith exercised his option granted in the lease to consider the lease terminated. It thereupon

ordered Smith as lessor to resume operations in his own behalf. On January 10, 1950, the entire Commission denied a petition for reconsideration and vacation of the 1949 order of Division 5. In the 1950 order the Commission found the facts were substantially as stated in the 1949 order, and, that in accordance with the terms of the lease agreement, all operating rights involved in the transaction had reverted to Smith.

5. On March 20, 1950 plaintiff filed its complaint herein seeking to set aside and enjoin the above described orders entered by the Commission on October 17, 1949 and January 10, 1950.

6. By order dated May 23, 1950 the Commission on its own motion reopened the proceedings for further consideration and formal hearing. In an order dated June 9, 1950, the Commission notified all parties that the matter would be the subject of a formal hearing on July 11, 1950, before Joint Board 136, at Omaha, Nebraska. Said order contained an elaborate statement of the facts in controversy, and a detailed recitation of the administrative history of the controversy. At the hearing before the Joint Board on the date assigned, appearances were entered on behalf of the plaintiff, Smith (and another party whose participation therein is not pertinent in this proceeding). Smith (and the other party) introduced evidence but none was offered on behalf of the plaintiff.

7. At the conclusion of the hearing the Joint Board, on October 27, 1950 issued its recommended report and order based on the evidence adduced at the hearing in which it found that there had been a discontinuance of operations by the partnership which caused the reversion of the operating rights to Smith. It further found that the partnership composed of the plaintiff and Ross was dissolved on December 15, 1948 and that thereafter no operations had been conducted by the partnership as such. It also found that no operations were conducted by the partnership, or by the plaintiff, or by the plaintiff and any other person associated with him, for a period of approximately 90 days prior to June 1949 and that such discontinuance of operations resulted in the reversion of the operating rights to

Smith, and that the lease approved by the Commission on April 8, 1948 (and concerning which the substitution of the partnership as lessee was approved December 16, 1948) was of no further force and effect.

8. On March 27, 1951, Division 5 of the Commission issued its report and order summarizing and adopting the findings of fact made by the Joint Board in its recommended report and order, and also commenting on the exceptions filed by the plaintiff with respect to the report and order of the Joint Board. On November 13, 1951 the Commission denied a petition filed by the plaintiff seeking reconsideration of the 1951 order of Division 5.

And the Court sets forth as its

Conclusions of Law

1. This Court has jurisdiction of the cause and of the parties thereto (28 U. S. C. 1336, 1398, 2284, 2321-2325 and 49 U. S. C. 17(9), and 305(g)).

2. The Commission had jurisdiction over and the authority to conduct the proceedings wherein the said report and order of March 27, 1951 and the order of November 13, 1951 were made and had jurisdiction to make said report and orders. (49 U. S. C. 304(a)(6), 306(a), 321(b)).

3. The Commission's order of June 9, 1950, notifying the parties of the formal hearing to be held before Joint Board 136, on July 11, 1950, at Omaha, Nebraska, contained sufficient information to inform the parties of the nature of and reason of such hearing.

4. As shown by our foregoing findings of fact there was sufficient evidence of record, substantial in nature, to justify the Commission in finding that the plaintiff had discontinued operation of the motor carrier operating rights which it was authorized to conduct pursuant to the terms of a lease agreement approved by the Commission between the lessor and owner of such rights and a partnership of which the plaintiff was a member, and that by the terms of such lease agreement such discontinuance of operations caused an immediate reversion of such rights to the lessor and owner of the rights. The Commission's findings being supported by substantial evidence of record and providing

a rational basis for its conclusion are unassailable in this action. *Interstate Commerce Commission* v. *Union Pacific Railroad Co.*, 222 U. S. 541, 547; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146.

5. The authority for the plaintiff, as a member of the partnership, to conduct operations of the motor carrier rights involved was granted by the Commission pursuant to the provisions of its rules and regulations, generally referred to as its Transfer Rules, issued in accordance with Section 212(b) of the Interstate Commerce Act, 49 U. S. C. 312(b). Said rules and regulations are published in the 1949 edition of the Code of Federal Regulations under Part 179, Title 49.

6. In accordance with Section 179.4 of said Transfer Rules the lease agreement between the partnership and the owner and lessor of the rights here involved included the provision that:

> ". . . all operating rights involved in the transaction shall revert to the transferor at any time prior to the expiration of said term, or upon a discontinuance of operations thereunder by the transferee at any time prior to the expiration of said term. In case of reversion the transferor shall give immediate notice thereof to the Commission."

7. The Commission's report and orders were made and issued within its statutory authority, upon adequate findings and substantial evidence, after full and fair hearing, and are valid and lawful in all respects.

8. The relief prayed for in the complaint is denied, and the complaint is dismissed, plaintiff to pay the costs.

Dated this 26th day of May, 1952.

H. Nathan Swaim,
United States Circuit Judge;
Michael L. Igoe,
United States District Judge;
Joseph Samuel Perry,
United States District Judge.

APPENDIX "B"

§ 312. Suspension, change, revocation and transfer of certificates, permits, and licenses:

(a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for wilful failure to comply with any provision of this chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 304(c) of this title, commanding obedience to the provision of this chapter, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of sections 306, 309, or 311 of this title, or by virtue of the second proviso of section 306(a) of this title or temporary authority under section 310a of this title, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of sections 311(c), 317(a), or 318(a) of this title or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

(b) Except as provided in section 5 of this title, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe. Feb. 4, 1887, c. 104, Part II, § 212, as added Aug. 9, 1935, c. 498, 49 Stat. 555, and amended June 29, 1938, c. 811, § 11, 52 Stat. 1238; Sept. 18, 1940, c. 722, Title I, § 21 (c, d), 54 Stat. 924.

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 50 C 383

FRANK KORNFEIND, Doing Business as Chicago-Nebraska Motor Express, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*

Final Judgment and Decree

The above entitled action having come on for final hearing on April 28, 1952 before a duly constituted District Court of three judges convened pursuant to Sections 2284 and 2325 of Title 28, United States Code and all parties being represented by counsel, and the Court having heard the arguments of counsel, and having considered the pleadings, the evidence taken before the Interstate Commerce Commission, the arguments and briefs of consel, and the Court being fully advised in the premises, and the Court having filed its findings of fact and conclusions of law herein on May —, 1952 and in accordance therewith the Court being of opinion and conclusion that the Interstate Commerce Commission orders entered March 27, 1951 and November 13, 1951 are valid and lawful in all respects, it is hereby

Ordered and Adjudged, and Decreed, that the relief prayed for in the complaint be, and it is hereby, denied and the complaint is dismissed, plaintiff to pay the costs.

Dated this 26th day of May, 1952.

H. NATHAN SWAIM,
United States Circuit Judge;
MICHAEL L. IGOE,
United States District Judge;
JOSEPH SAMUEL PERRY,
United States District Judge.

(3743)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Civil Action No. 50 C 383

FRANK KORNFEIND, Doing Business as Chicago-Nebraska Motor Express, *Plaintiff-Appellant*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants-Appellees*

MOTION TO AFFIRM

Pursuant to Rule 12, para. 3, of the Revised Rules of the Supreme Court of the United States, appellees move that the judgment and decree of the district court be affirmed.

This is a direct appeal from the final judgment and decree of a specially constituted three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325. The decree, entered May 26, 1952, dismissed appellant's complaint which sought to set aside certain orders of the Interstate Commerce Commission. Appeal was allowed on July 23, 1952 and appeal papers were served on the same date.

The facts, which are undisputed, are set forth in detail in the district court's Findings of Fact and Conclusions of Law. They may be briefly summarized as follows:

In June 1944, the Interstate Commerce Commission issued a certificate of public convenience and necessity to one Harper, authorizing motor carrier operations over regular routes between Chicago, Illinois and Hastings, Nebraska. In 1946, by appropriate order, the Commission approved the acquisition of these rights by one C. H. Smith. In April 1948, the Commission authorized a five-year lease of the operating rights to one W. G. Ross. In December of the same year, the Commission authorized appellant and Ross, as a partnership doing business under the name of Chicago-Nebraska Motor Express, to be substituted as lessee of the operating rights in lieu of W. G. Ross.

The lease, conforming to the Commission's Transfer Rules (see 49 C.F.R. 179.4, Appendix, *infra*) contained the following provision:

> * * * all operating rights involved in the transaction shall revert to the transferor at any time prior to the expiration of said term, or upon a discontinuance of operations thereunder by the transferee at any time prior to the expiration of said term. In case of reversion the transferor shall give immediate notice thereof to the Commission.

The lessee subsequently suspended operations for approximately ninety days.[1] On April 18,

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[1] This is conceded by appellant. See Statement as to Jurisdiction, p. 15.

1949, Smith, the lessor, filed a petition with the Commission alleging that the partnership had abandoned the operations covered by the lease, had permitted insurance required by Commission regulations to lapse, and had ignored demands made upon it to reinstitute service. The petition prayed issuance of an order terminating the lease. Upon consideration of the petition and appellant's answer thereto, Division 5 of the Commission, without holding a hearing, entered an order dated August 3, 1949, terminating the lease arrangement and requiring Smith to resume operations in his own behalf within a period of thirty days. On January 10, 1950, the Commission denied reconsideration of the order.

On May 23, 1950, the Commission on its own motion reopened the proceedings for a formal hearing. A subsequent order, dated June 9, 1950, referred the matter to a Joint Board sitting in Omaha, Nebraska. After a full hearing, the Joint Board, on October 27, 1950, issued a proposed report and order recommending that Smith be directed to resume operations under the certificate of public convenience and necessity. In its report, the Joint Board found that there had been a discontinuance of operations by the partnership which caused a reversion of the operating rights to Smith; that the partnership composed of the appellant and Ross was dissolved on December 15,

1948, and that thereafter no operations had been conducted by the partnership as such; that no operations were conducted by the partnership, by the appellant, or by the appellant and any other person associated with him for a period of approximately ninety days prior to June 1949; that discontinuance of the operations resulted in the reversion of the operating rights to Smith, and that the lease approved April 8, 1948 was of no further force and effect. On March 27, 1951, Division 5 issued a report (52 M.C.C. 567) which adopted the findings of fact made by the Joint Board. Its order directed that the orders previously entered in the proceedings remain in full force and effect. On November 13, 1951, the entire Commission denied a petition for reconsideration. Appellant's complaint sought to set aside the orders terminating its rights.

In substance, appellant contends that, regardless of the terms of the lease and the requirements of the Commission's Transfer Rules, the rights of the lessee could not be terminated until it was given "a reasonable period of time to correct its alleged deficiencies, in the light of the requirements of 49 U.S.C. Section 312 (a) * * *" (Statement as to Jurisdiction, p. 2).

Section 212 (a) of the Interstate Commerce Act (see Appendix, *infra*), upon which appellant rests its case, relates exclusively to the suspension and

revocation of "certificates, permits and licenses".[2] It provides in part that no "certificate, permit or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided etc." The instant case does not involve a revocation of the certificate acquired by Smith. Indeed, it will be noted that the Commission's order requires Smith to resume the operations authorized by the certificate. We have here the simple question: Did the Commission have the authority to declare that the temporary transfer of Smith's rights to appellant, pursuant to a lease approved by the Commission, had terminated?

The issue is controlled by Section 212 (b) which provides in substance that transfers may take place "pursuant to such rules and regulations as the Commission may prescribe". Exercising its authority to prescribe rules, the Commission has directed (49 C.F.R. 179.4):

> § 179.4 *Leases and contracts to operate.* Applicants who seek approval of a transfer of

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[2] These terms are defined in the Act (Section 203 (a), 5, 6, 7) as follows: "The term 'certificate' means a certificate of public convenience and necessity issued under this part to common carriers by motor vehicle; [t]he term 'permit' means a permit issued under this part to contract carriers by motor vehicle; [t]he term 'license' means a license issued under this part to a broker."

> operating rights for a limited period, whether by lease, operating contract, or otherwise, shall state in their application the specific period for which such transfer is sought, the consideration for such transfer and the time and method of payment thereof, and that the applicants have agreed in writing that all operating rights involved in the transaction shall revert to the transferor at the expiration of said term, or upon a discontinuance of operations thereunder by the transferee at any time prior to the expiration of said term. In case of reversion, the transferor shall give immediate notice thereof to the Commission.

As previously noted, the lease which the parties submitted to the Commission for approval contained the provision that the leased rights would revert to the lessor in the event of a discontinuance of service by the lessee. The lessee, having admittedly failed to comply with the explicit conditions on the basis of which the Commission approved the temporary leasing of the rights, can scarcely be heard to complain that his rights have now been terminated in accordance with the Rules of the Commission and the terms of the lease.

A party who has been issued a franchise by the Commission on the basis of his representations that he is fit, willing and able has no right to transfer that franchise at will. Section 212 (b); *United*

States v. *Resler*, 313 U.S. 57, 61; cf. *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 448. If the Commission grants him the privilege of leasing the rights to another for a limited period of time, it can attach reasonable conditions to that permission. *Ibid.*[3] And there can be no serious question that it is reasonable to provide that the substitute or lessee can exercise the leased rights only so long as he renders continuous and adequate service to the public. See Section 204 (a) (1).

Appellant makes the subsidiary point that the orders issued by Division 5 and by the Commission on August 3, 1949 and January 10, 1950, respectively, were not based upon a hearing. It would appear wholly unnecessary to determine whether the pleadings, standing alone, warranted entry of those orders, since a full hearing was held before a Joint Board prior to the time that the ultimate orders of the Commission were issued.[4]

Appellant also questions the adequacy of the notice which set the case for hearing before the Joint Board. The district court stated (Fdg. No. 6):

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[3] *On-Time Transfer Co.* v. *Buckingham*, 44 M.C.C. 389, cited by appellant, is not in point. As stated in the report of Division 5 (52 M.C.C. at 574), that case did not involve Section 212 (b) or the Commission's Transfer Rules issued thereunder.

[4] It may be noted parenthetically that appellant has not at any stage of the proceedings denied that it discontinued service.

> In an order dated June 9, 1950, the Commission notified all parties that the matter would be the subject of a formal hearing on July 11, 1950, before Joint Board 136, at Omaha, Nebraska. Said order contained an elaborate statement of the facts in controversy, and a detailed recitation of the administrative history of the controversy. * * *

The court held further (Concl. No. 3) that this order "contains sufficient information to inform the parties of the nature of and reason for such hearing". It is appellant's position, however, that the notice was defective because it failed to define the issues which the Joint Board would consider. This contention is frivolous. Prior to issuance of the order of June 9, 1950, Smith had petitioned the Commission to terminate the lease, appellant had answered the petition, and the Commission had entered orders granting the relief prayed. This prior administrative history was fully recited in the notice which set the matter down for hearing. Consequently, there can be no doubt that appellant knew full well the nature of the matter assigned to the Joint Board for its consideration. Obviously, there was but one matter to consider—whether the termination of the lessee's rights had been proper.[5]

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[5] Since appellant concedes that service was discontinued, it is difficult to imagine what he could possibly gain by a further hearing. The issue of law—whether that discontinuance warranted termination of the lease—is the issue which he has already taken to court.

The substantive issue before the district court—the authority of the Commission under Section 212 (b) to regulate transfers—has been correctly decided. *United States* v. *Resler, supra.* It is equally plain that the conditions affixed to the lease in question were reasonable. Since it is undisputed that appellant failed to comply with these conditions, it is evident that this case presents no substantial question. The decree of the district court should accordingly be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

EDWARD M. REIDY,
Chief Counsel,
Interstate Commerce Commission.

AUGUST 1952.

APPENDIX

Excerpts from Transfer Rules Promulgated by the Commission and Published in the Code of Federal Regulations 1949 Ed.). Part 179.

§ 179.1 *General.* (a) As used in this part, the term "transfer" shall include all transactions, not included within section 5 and 210a (b) of the Interstate Commerce Act, whether by purchase, lease, contract to operate, or otherwise, whereby an operating right as a motor carrier arising out of the Interstate Commerce Act is acquired by one person from another.

(b) The term "operating right" as used in this part includes the right to operate as a motor carrier in interstate or foreign commerce over a route or routes or within a specified territory, as authorized by a certificate of public convenience and necessity or a permit issued by this Commission. . . .

* * *

(d) No attempted transfer of any operating right shall be effective except upon full compliance with the rules and regulations in this part and until after the Interstate Commerce Commission has approved such transfer as herein provided. . . .

* * *

§ 179.2 *Applications to transfer.* (a) Applications for approval of the transfer of operating rights shall be made in writing to the Commission

and shall be in such form and contain such information as the Commission shall prescribe.

* * *

(c) . . . the proposed transfer described in any such application shall be approved if it appears that the proposed transaction is one which is not subject to the provisions of section 5, Interstate Commerce Act, that the proposed transfer, if approved, will not result in unlawful ownership or control of a motor carrier, and that the proposed transferee is fit, willing, and able properly to perform the service authorized by the operating rights sought to be transferred, and to conform to the provisions of the Interstate Commerce Act and the requirements, rules and regulations of the Commission thereunder. Otherwise the application shall be denied.

* * *

§ 179.4 *Leases and contracts to operate.* Applicants who seek approval of a transfer of operating rights for a limited period, whether by lease, operating contract, or otherwise, shall state in their application the specific period for which such transfer is sought, the consideration for such transfer and the time and method of payment thereof, and that the applicants have agreed in writing that all operating rights involved in the transaction shall revert to the transferor at the expiration of said term, or upon a discontinuance of operations thereunder by the transferee at any time prior to

the expiration of said term. In case of reversion, the transferor shall give immediate notice thereof to the Commission.

Sections 212 (a) and 212 (b) of Interstate Commerce Act, as amended, 49 U.S.C. 312 (a) and 312 (b)

(a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this

part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further*, That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of Section 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211 (c), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

(b) Except as provided in section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe.

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12

Office - Supreme Court

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 321

FRANK KORNFEIND, DOING BUSINESS AS CHICAGO-NEBRASKA EXPRESS,

Appellant,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

REPLY TO MOTION TO AFFIRM

JOSEPH E. KELLER,
THOMAS H. WALL,
Counsel for Appellant.

INDEX

Subject Index

	Page
Reply to motion to affirm	1

Table of Cases Cited

Riss and Company, Inc. v. *Interstate Commerce Commission*, 341 U.S. 907	3
United States v. *Resler*, 313 U.S. 57	2

Statutes and Other Authorities Cited

Administrative Procedure Act:	
Section 2(e)	3
Section 5(a)	2
Section 9(b)	2, 3
Interstate Commerce Act:	
Section 212(a)	1, 2, 3
Section 212(b)	1, 2, 3
United States Code:	
Title 5:	
Section 1001(e)	3
Section 1004(a)	2
Section 1008(b)	2
Title 49:	
Section 312(a)	2
Section 312(b)	1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Civil Action No. 50 C 383

FRANK KORNFEIND, DOING BUSINESS AS CHICAGO-NEBRASKA MOTOR EXPRESS,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees

REPLY TO MOTION TO AFFIRM

Pursuant to Rules 7(3) and 12(3) of the Revised Rules of the Supreme Court of the United States, Appellant replies as follows to Appellees' Motion to Affirm:

Appellees have completely misstated the issues in this appeal. The substantive issue before the District Court was not, as Appellees state (Motion to Affirm, p. 9), concerned with the authority of the Commission under Section 212(b) of the Interstate Commerce Act (49 U.S.C. Sec. 312(b)) to regulate transfers. On the contrary, the issue relates to Sec. 212(a) of that Act and certain provisions of the Administrative Procedure Act, discussed infra. Further, Appellant does not challenge the legal principle, relied upon by Appellees, that a party who has been issued a franchise by the Interstate Commerce Commission on the basis of his representations that he is fit, willing and able,

has no right to transfer that franchise at will (*Motion to* Affirm, p. 6). For that reason, *United States* v. *Resler*, 313 U. S. 57, relied upon by Appellee, is inapplicable.[1] The question presented in this appeal is whether, consistent with the requirement of Section 212(a) of the Interstate Commerce Act (49 U.S.C. Sec. 312(a)), and Section 9(b) of the Administrative Procedure Act (5 U.S.C. Sec. 1008(b)), the Commission has the legal authority to terminate the rights of Appellant, who had been authorized by that agency to lease the operating rights of his lessor, without giving the lessee a reasonable period of time to correct alleged deficiencies and without affording the lessee (Appellant), before hearing, ample notice of the legal and factual issues in due time to examine, consider and prepare for those issues. Section 5(a) of the Administrative Procedure Act (5 U.S.C. Sec. 1004(a)).

Appellee takes the position that Section 212(a) of the Interstate Commerce Act relates exclusively to the suspension and revocation of "certificates, permits and licenses," and that since the Commission did not revoke the certificate acquired by Smith, (Appellant's lessor), Appellant has no standing to complain. It is clear that the Commission, in approving the lease and in authorizing Appellant and Ross, as a partnership, doing business under the name of Chicago-Nebraska Motor Express, to perform this service, gave to Appellant and his partner a license as

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[1] There, the court held that the Commission acted within its authority to prescribe rules and regulations to implement Section 212(b) in ruling that its consent was a condition precedent to an effective transfer governed by that section. However, it should be noted that in the *Resler* case the court stated, 313 U.S. 57, 60: "In many respects a transferee such as appellee stands in the same relation to the Commission as an original applicant for permission to operate."

that term is defined in Section 2(e) of the Administrative Procedure Act.[2] Despite the fact that the Administrative Procedure Act is applicable to the instant case, and despite the fact that the Interstate Commerce Commission is bound by the requirements of that Act (*Cf. Riss and Company, Inc. v. Interstate Commerce Commission*, 341 U. S. 907), Appellee contends, in effect, that its requirements may be ignored by the Commission and that Appellant has no standing to complain, since lessor Smith's authorization was not withdrawn. In order to follow Appellee's contention to its logical conclusion, it would be necessary for this Court to hold: (1) that Section 212(a) of the Interstate Commerce Act is inapplicable to transfer cases; (2) that the Interstate Commerce Commission is not subject to the Administrative Procedure Act, particularly, Section 9(b); and (3) that because Section 212(b) of the Interstate Commerce Act is silent with respect to the procedure to be followed in transfer cases, the Commission is free to revoke its approval of a transfer at any time without notice, without hearing, and without any opportunity to achieve compliance with the requirements of the Commission. Such a position is wholly untenable.

It is respectfully submitted that the instant case presents a substantial question for the decision of this court, *i.e.*, the application of Section 212(a) of the Interstate Commerce Act and Section 9(b) of the Administrative Procedure Act, to the revocation of Commission approval of

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[2] 5 U.S.C. Sec. 1001(e). A license includes "• • • the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." Licensing includes "• • • agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license."

the transfer of a certificate. Therefore, it is submitted that the Appellee's motion to affirm should not be granted.

Respectfully submitted,

JOSEPH E. KELLER,
600 Munsey Building,
Washington 4, D. C.;
THOMAS H. WALL,
600 Munsey Building,
Washington 4, D. C.,
Counsel for Plaintiff-Appellant.

August 14, 1952.

No. 321. KORNFEIND, DOING BUSINESS AS CHICAGO-NEBRASKA MOTOR EXPRESS, *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of Illinois. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Joseph E. Keller* for appellant. *Solicitor General Perlman* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission, appellees.